No. 11,953

IN THE

United States Court of Appeals

For the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING REFINING AND MINING COMPANY, a corporation, FIRST NATIONAL BANK OF FAIRBANKS, Executor of the Estate of Gustaf Soderblom, and WALTER JENSEN,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

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To the Honorable William Healy, Homer T. Bone, and Walter L. Pope, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

We respectfully ask a rehearing of this case because the burden of proof provisions of the Waskey Act *are* in irreconcilable conflict with "The laws of the United States relating to mining claims, mineral locations and rights incident thereto," as enunciated in *Hammer v. Garfield Min. Co.* (1889) 130 U.S. 291, and faithfully followed by the courts in the following cases since 1889:

Book v. Justice Min. Co. (D.Nev. 1893) 58 Fed. 106;
Justice Min. Co. v. Barclay (D.Nev. 1897) 82 Fed. 554;
Walton v. Wild Goose Mining & Trading Co. (9 Cir. 1903) 123 Fed. 209;
M'Culloch v. Murphy (D.Nev. 1903) 125 Fed. 147;
Willitt v. Baker (W.D.Ark. 1904) 133 Fed. 937;
Zerres v. Vanina (D.Nev. 1905) 134 Fed. 610;
M'Kay v. Neussler (9 Cir. 1906) 148 Fed. 86;
Wailes v. Davies (D.Nev. 1907) 158 Fed. 667;
Moodey v. Dale Consol. Mines (9 Cir. 1936) 81 F (2d) 794 (cert. den. 299 U.S. 549);
Johnson v. Young (1893) 18 Colo. 625, 34 Pac. 173;
Strasburger v. Beecher (1897) 20 Mont. 143, 49 Pac. 740;
Harris v. Kellogg (1897) 117 Cal. 484, 49 Pac. 708;
Power v. Sla (1900) 24 Mont. 243, 61 Pac. 468;
Crown Point Gold-Min. Co. v. Crismon (1901) 39 Or. 364, 65 Pac. 87;
Callahan v. James (1903) 141 Cal. 291, 74 Pac. 853;
Goldberg v. Bruschi (1905) 146 Cal. 708, 81 Pac. 23;
Tiggeman v. Mrzlak (1909) 40 Mont. 19, 105 Pac. 77.

All of these cases are founded on the annual labor provisions of R.S. 2324 as interpreted by Justice Field in the *Hammer* case, which the foregoing cases show to be the law of the United States. We are not talking solely of the general laws of Congress, but rather of the laws of the United States. It must be remembered that the 1938 Act restored to Alaska "The laws of the United States relat-

ing to mining claims, mineral locations and rights incident thereto * * *." Certainly the necessary construction and application of a congressional statute becomes an integral part of the "laws of the United States." The Supreme Court having construed and interpreted the statute that matter was then concluded.

> "It is not now disputed that when any question, arising under the laws of the United States, has been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior national courts. No issue growing out of any statute, which has been once so adjudicated, can be said to involve in its determination the construction of such statute. It has been construed; there is nothing left to construe. All there is left is to follow the construction given" (*Inez Min. Co. v. Kinney* (D. Idaho 1891) 46 Fed. 832, 834).

It seems hardly possible, therefore, that this court should have intended the novel result that a controlling decision of the United States Supreme Court, interpreting a federal annual labor statute, is not part of the law of the United States relating to mining claims, mineral locations, and rights incident thereto.

R.S. 2324 imposed the obligation of annual labor as a condition of holding mining claims to avoid forfeiture. It does not declare that a senior locator must prove his labor or that a junior locator must prove the failure to perform the labor. In the *Hammer* case, the Supreme Court, therefore, had to determine under the statute where the burden of proof lay and it unequivocally held that the junior

locator asserting the forfeiture had the burden of proving it. There would be no necessity to decide the question of burden of proof in the absence of the statute, and the existence of the statute made it necessary for the court to interpret the statute and determine where that burden lay. *Hammer v. Garfield Min. Co., supra,* therefore necessarily interpreted R.S. 2324 (*El Paso Brick Co. v. McKnight* (1913) 233 U.S. 250, 259-260).

In 1938 Congress could hardly have failed to realize that with a shifting and migratory population in Alaska and the steady dying off of old-time witnesses (Gustaf Soderblom, co-plaintiff in No. 5494, died at Ketchikan while returning to testify in this case, and his executor was substituted at time of trial, Tr. pp. 6, 64), an intolerable and nearly unsupportable burden would be imposed upon persons continuing to own or purchasing mining claims staked more than a few years ago by the retention of the burden of proof provisions of the Waskey Act. In repealing the forfeiture provisions, as this Court has held it did, Congress also necessarily repealed the Siamese "burden of proof" provision and reinstated in Alaska the laws of the United States.

We request that the rehearing be granted and that this court affirm the judgment of the district court that the 1938 Act repealed the burden of proof provisions of the Waskey Act as well as the forfeiture provisions. In the event that this court should not affirm that judgment, appellees should at least be given the opportunity to submit evidence of the performance of labor, which opportunity they did not have under the theory upon which the case

was tried by the district court and the parties that the burden of proof was on appellant (Tr. pp. 14-17, 23-25, 36, 39, 46, 58-59, 80, 88-90, 90-102).

Dated, San Francisco, California,
July 20, 1949.

SOUTHALL R. PFUND,
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PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

Certificate of Counsel

I hereby certify that I am one of the counsel for appellees and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 20, 1949.

Southall R. Pfund,
Attorney for Appellees and Petitioners.